Supreme Court, U. S.
FILED
JAN 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-707

W. D. ATKINS, JR.,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

BRIEF OF STATE OF LOUISIANA, RESPONDENT

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
OF LOUISIANA

J. NATHAN STANSBURY
FIFTEENTH JUDICIAL
DISTRICT ATTORNEY

WILLIAM J. BURRIS
ASSISTANT DISTRICT
ATTORNEY
P. O. Box 3306
Lafayette, Louisiana 70502
Telephone (318) 232-5170

SCOFIELDS' QUALITY PRINTERS, P. O BOX 53096, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ARGUMENT:

I. Continuance Claim 3

II. Notice Claim 4

III. The Five of Six Verdict 6

IV. Sufficiency of Evidence 14

CONCLUSION 15

CERTIFICATE 17

TABLE OF AUTHORITIES

Cases:

Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628 9,13

Avery v. Alabama, 308 U.S. 444, 446, 60 S.Ct. 321, 322 (1940) 4

Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1028 (1978) 6,12

Daniel Burch & Wrestle, Inc. v. Louisiana, October Term No. 78-90 13,14

Cochran & Sayre v. United States, 157 U.S. 286 290, 15 S.Ct. 628, 630 5

Frazier v. United States, 335 U.S. 497, 69 S.Ct. 201 6

Arthur Johnson v. United States, 225 U.S. 405, 32 S.Ct. 748 6

TABLE OF AUTHORITIES (Continued)

Page

Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620 9,11,13

Morissette v. United States, 342 U.S. 246, 276, 72 S.Ct. 240, 256 (1952) 15

Russell v. United States, 369 U.S. 749, 765, 82 S.Ct. 1038, 1047-1048 5

State v. Atkins, 360 So.2d 1341 5

State v. McKinnon, 317 So.2d 184 (1975) 15

Thompson v. City of Louisville, 362 U.S. 199, 204, 80 S.Ct. 624 15

Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 849 4

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970) 7,9,12,13

Statutes:

L.R.S. 14:67 2,7

L.R.S. 15:445 15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-707

W. D. ATKINS, JR.,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

BRIEF OF THE STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

Petitioner, W. D. Atkins, Jr., is an attorney who was accused and convicted of the theft of funds of his client. Petitioner had represented Pamela B. Gray and her daughter in a wrongful death action resulting from the death of her husband, Thomas Gray. Petitioner ob-

tained a settlement of $89,517.73 in February of 1975. As of the date of the filing of the bill of information on July 17, 1975, Mrs. Gray, despite many requests and demands for her funds, received nothing except relatively small advances. The State indicted Mr. Atkins on July 17, 1975 with having committed a theft from Pamela Gray sometime between February 3, 1975 and the date of the bill of information (July 15, 1975).

The Louisiana Theft Statute is a combination of several crimes which involve a permanent taking. It includes such common law crimes as larceny, embezzlement, and fraud. R.S. 14:67 reads in pertinent part as follows:

> "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practice or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential."

The instant case is a good illustration of why these crimes were combined within one Statute. The State was faced with a crime that undoubtedly had been committed but could have been committed by any one of the manners proscribed in the Statute. Through the course of events between February 3, 1975 and July 15, 1975, it was quite obvious that Mr. Atkins had the intent to permanently deprive Mrs. Gray of her settlement funds. Mr. Atkins even tried to justify his actions by rendering a worksheet actually showing that Mrs. Gray was not entitled to any remaining funds. Mr. Atkins had placed $20,000.00 of the funds in a checking account of another business venture not related to his legal practice. (The Tropical Fish Bowl). Before July 15, 1975, the "client's account" had been depleted and was closed.

ARGUMENT

I.

Petitioner claims that he was denied his right to compulsory process of witnesses by the failure of the trial judge to grant a continuance. Petitioner had requested the continuance due to the failure of a defense witness to appear for court. In fact, the petitioner did not seek compulsory process by requesting a subpoena. Sometime between January 18, 1977 and March 8, 1977, counsel states that the location of Mrs. Jeanette Deshotels was learned. The exact date she was located was never shown. Petitioner's claim that there was not enough time is without support. He could have tried to get process and the Court would have been able to determine if in fact there was not enough time. However, defendant did not try to secure compulsory process, so it is not within the trial court or this court's knowledge as to whether he did or did not have time. Instead of seeking compulsory process, the defense states that it depended upon an agreement by the

witness to appear. The defense made the allegation at the hearing on the motion for continuance that a family emergency prevented the witness from appearing.

"The matter of continuance is traditionally within the discretion of the trial Judge." *UNGAR v. SARAFITE*, 376 U.S. 575, 589, 84 S.Ct. 841, 849. The denial of a continuance will not ordinarily be reviewed by the Supreme Court. *AVERY v. ALABAMA*, 308 U.S. 444, 446, 60 S.Ct. 321, 322 (1940). Only "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" should result in a reversal. *UNGAR*, Ibid at page 589 (U.S.), page 849 (S.Ct.). In *UNGAR*, the court further stated:

> "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *UNGAR v. SARAFITE*, 376 U.S. 575, 589, 84 S.Ct. 841, 850."

It is clear that the trial judge acted within his sound discretion in denying a continuance without any attempt to secure compulsory process.

II.

Petitioner claims that he did not receive proper notice under the Sixth and Fourteenth Amendments

due to the fact that he did not receive adequate answers to bills of particulars. Petitioner was charged by Indictment on July 17, 1975 and was at that time, informed of the crime he was charged with and the victim of the crime. Five days before trial defendant was further informed that he was charged with a theft of a certain amount of money from a client between February 3, and July 17, 1975 by taking them from an account in a bank in Baton Rouge which petitioner had opened for safekeeping of the funds. The defense wanted the State to do something that was impossible for the State to do, specify the exact time and the exact manner of taking the funds. The State did, however give information sufficient for the petitioner to identify the alleged criminal transaction and to prepare a defense. *STATE v. ATKINS*, 360 So.2d 1341.

A defendant in a criminal case has a right to know with reasonable certainty the nature of the accusation against him. There must be a statement of facts sufficient to inform the accused of the specific offense he is charged with. *RUSSELL v. UNITED STATES*, 369 U.S. 749, 765, 82 S.Ct. 1038, 1047-1048. In *COCHRAN AND SAYRE v. UNITED STATES*, 157 U.S. 286, 290, 15 S.Ct. 628, 630 the court stated:

> "The true test of the sufficience of an indictment is not whether it could have been made more definite or certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are

> taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Also see UNITED STATES v. DEBRAW, 346 U.S. 374, 74 S.Ct. 113; HAMLING v. UNITED STATES, 418 U.S. 87, 94 S.Ct. 2887."

Petitioner had sufficient information from the Indictment and the answers to bills of particulars to know the specific crime he was charged with, to prepare for a defense, and to plead double jeopardy if tried for the crime again.

III.

Petitioner argues that the judgment of conviction based upon a verdict of five persons of a six person jury is unconstitutional in light of *BALLEW v. GEORGIA*, 435 U.S. 223, 98 S.Ct. 1028 (1978). It should first be noted that petitioner never objected to his mode of trial until his motion for rehearing before the Louisiana Supreme Court. It is the contention of the State that certiorari should be denied due to petitioner's failure to object until the case was on appeal. *ARTHUR JOHNSON v. UNITED STATES*, 225 U.S. 405, 32 S.Ct. 748; *FRAZIER v. UNITED STATES*, 335 U.S. 497, 69 S.Ct. 201.

The Louisiana jury trial scheme is set forth in Article I, Section 17 of the Louisiana Constitution of 1974. The

number of jurors and degree of unanimity increases with the harshness of the penalty. In the case of the harshest penalty (the possibility of capital punishment) the Constitution requires a unanimous verdict by a twelve person jury to convict or acquit. In cases where the penalty provision would require confinement at hard labor, a jury of twelve persons is required and a verdict is rendered for conviction or acquittal if ten of that number concur. In cases which could entail punishment with or without hard labor, a jury of six is required of which five must concur in the determination of guilt or innocence.

In petitioner's trial, he was accused of theft in an amount over $500.00. Louisiana Revised Statutes Title 14, Section 67. The penalty for this crime is imprisonment "with or without hard labor, for not more than ten years" or a fine not to exceed $3,000 or both. Therefore, a six person jury was impanelled. Mr. Atkins was convicted by the concurrence of five members of the jury.

It is clear that a six person jury is constitutional when a unanimous vote is required. *WILLIAMS v. FLORIDA*, 399 U.S. 78, 90 S.Ct. 1893 (1970). In *WILLIAMS* this Court made an exhaustive study of the history of the jury system and concluded that the number of twelve jurors was quite accidental. Ibid at page 90. The Court also explored the legislative history of the Sixth Amendment and determined that little intent could be derived from such an inquiry. It is interesting to note in

this regard that the final draft dropped provisions of the original draft requiring unanimity. Ibid at page 96. The Court therefore determined that the relevant inquiry as to jury trial matters must be viewed in relation to whether it furthers the purpose for which that particular aspect of the jury trial was created to safeguard. Measured by that standard, the Court determined that the twelve member jury was not an indispensable component of the Sixth Amendment. Ibid at page 100. The Court stated:

> "The purpose of the jury trial, as we noted in *DUNCAN*, is to prevent oppression by the government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' DUNCAN v. LOUISIANA, Supra, 391 U.S., at 156, 88 S.Ct., at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. *WILLIAMS v. FLORIDA*, 399 U.S. 78, 100, 90 S.Ct. 1893, 1905-1906.

The Court in *WILLIAMS* did not require unanimity. In fact, the Court expressly reserved opinion on that matter. Ibid. Note 46.

The matter of whether unanimity was required in the jury trial system was decided in *JOHNSON v. LOUISIANA*, 406 U.S. 356, 92 S.Ct. 1620 and *APODACA v. OREGON*, 406 U.S. 404, 92 S.Ct. 1628. In *JOHNSON* the Court determined the constitutionality of Louisiana's nine out of twelve vote requirement and in *APODACA* it determined Oregon's ten out of twelve vote requirement. In other words, in *JOHNSON* the Court reviewed whether the vote of 75% of the jurors to convict or acquit was constitutional. In *APODACA*, the percentage was approximately 83% required to convict or acquit.

The Court in each case upheld the constitutionality of the respective statutes. The Court stated:

> "It is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt. *JOHNSON v. LOUISIANA*, 406 U.S. 356, 360, 92 S.Ct. 1620, 1623.

The Court clearly dealt with contention that a non-unanimous verdict was inconsistent with proof beyond a reasonable doubt. The Court stated:

"In considering the first branch of appellant's argument, we can find no basis for holding that the nine jurors who voted for his conviction failed to follow their instructions concerning the need for proof beyond such a doubt or that the vote of any one of the nine failed to reflect an honest belief that guilt had been so proved. Appellant, in effect, asks us to assume that, when minority jurors express sincere doubts about guilt, their fellow jurors will nevertheless ignore them and vote to convict even if deliberation has not been exhausted and minority jurors have grounds for acquittal which, if pursued, might persuade members of the majority to acquit. But the mere fact that three jurors voted to acquit does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt about guilt. We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A ma-

> jority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt. Indeed, at this point, a "dissenting juror should consider whether his doubt was a reasonable one . . . (when it made) no impression upon the minds of so many men, equally honest, equally intelligent with himself." ALLEN v. UNITED STATES, 164 U.S. 492, 501, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896). JOHNSON v. LOUISIANA, 406 U.S. 356, 360, 363, 92 S.Ct. 1620, 1624.

The Court very correctly reasoned that reasonable men can disagree and that such is not equivalent to failure of the State in its burden of proof. Ibid at U.S. page 362, S.Ct. page 1625. The Court makes an interesting observation in this regard concerning nonunanimity on the part of appellate judges. Extending that observation, if unanimity was required on questions of either law or fact by our appellate judges, it is doubtful that our judicial system could work. An eight to one appellate vote causes no problem, but one dissenting juror who disregards the reasonable argument of five (or eleven) others could result in a hung jury.

In 1978 the court decided the case of *BALLEW v. GEORGIA*, 435 U.S. 223, 98 S.Ct. 1029 declaring that Georgia's five person jury violated an accused's right to trial by jury. Under Georgia's legislation, all five members of the jury were required to concur in a verdict to convict or acquit. The Court left standing the constitutionality of the six person jury permitted in *WILLIAMS*, 98 S.Ct. 1029, 1038. It is clear that, under the Louisiana scheme, there are six persons in the group deliberation (as in *WILLIAMS*). There are six persons making critical contributions necessary for the solution of the problems involved as in *WILLIAMS*. There are the six memories as in *WILLIAMS* to draw on and not the five as in *BALLEW*. See Ibid at page 1035-1036. Certainly the same cross section of the community is selected. Ibid at page 1034. It seems clear that *BALLEW* does not affect the Louisiana Scheme because it upholds six person juries. The Louisiana system has six persons involved in meaningful deliberation, and remembering the important facts and arguments. It has six persons representing the common-sense of the entire community. See Ibid at pages 1039-1040.

The six persons (one alternate who did not deliberate) representing the common-sense of the community of Lafayette Parish, Louisiana heard approximately six hours of testimony during the trial and then deliberated on its verdict for one hour. The Court's instructions on the applicable law lasted one-half hour. The time of the trial was not so long as to affect a juror's memory of facts and arguments and the

time of deliberation of the jury on a relatively short trial obviously indicates a full and meaningful discussion of the guilt or innocence of the accused.

Much has been written about the affect of various numbers of jurors and probably an absolute decision on that subject will never be obtained (see citation of text in companion case *WRESTLE v. LOUISIANA*). There seems, to this writer, no guarantee of due process merely by numbers nor by unanimity. To say that this accused or any other does not get due process of law by a vote of five of six members can be nothing more than rank speculation.

It is clear that *JOHNSON* is authority for the constitutionality of the Louisiana jury scheme. The percentage of jurors concurring for conviction or acquittal are the same as in *APODACA* and even larger than the percentage in *JOHNSON*.

Petitioner in argument points to dicta in *WILLIAMS* (399 U.S. at 100) which would indicate that a unanimous jury verdict was required. However, the Court clearly reserved opinion on the matter. *WILLIAMS v. FLORIDA*, 399 U.S. 78, 100 n.46, 90 S.Ct. 1893, 1906 n.46. Just as clearly as that point was *dicta* in *WILLIAMS*, it was answered in *JOHNSON*, a later case. Petitioner's points concerning violation of cross-sectional and reasonable doubt requirements were clearly answered in *JOHNSON* and *APODACA*.

The State has a particular and compelling interest in this matter. Unanimity would increase the number of hung juries. This is true whether the overwhelming majority was for acquittal or conviction. A hung jury in cases where there was a great majority for either side requires an unnecessary use of further court time and results in additional expense. Even more important, in our mobile society further delay increases the chances of improper resolution of issues. In our jurisdiction a case in which a jury was hung would have to be rescheduled for a date approximately three months after the hung jury. Witnesses move, witnesses forget, witnesses may die, witnesses may get so annoyed at the system evidenced by the hung jury that they make themselves "unavailable". Therefore, a hung jury is detrimental to the true resolution of the facts. The State has a compelling interest to avoid such mistrials in situations where 83% of the jurors find a person guilty or innocent beyond a reasonable doubt.

The State would point out that this aspect of the case has also been briefed in the matter of *DANIEL BURCH and WRESTLE, INC. v. LOUISIANA*, October Term No. 78-90 and concurs in the arguments submitted by the State of Louisiana in that matter.

IV.

Petitioner claims that the State presented no evidence at all that at the time he received the funds that he had an intent to permanently deprive Mrs.

Gray of her funds. The case of *THOMPSON v. CITY OF LOUISVILLE*, 362 U.S. 199, 204, 80 S.Ct. 624 (1960) requires review and reversal only if there is no evidence of an essential element of the crime. If petitioner expects the State to show tangible evidence of his thoughts at the time he received the check, of course the State could not do so. However, the intent of the petitioner can clearly be ascertained from the totality of the events as they transpired. See La. R.S. 15:445; *STATE v. MCKINNON*, 317 So.2d 184 (1975); *MORISSETTE v. U.S.*, 342 U.S. 246, 276, 72 S.Ct. 240, 256 (1952). Placing the funds in non-professional business account is an indication of what Mr. Atkins intended. Not paying Mrs. Gray despite numerous demands over a six month period indicated his intentions. Giving a worksheet indicating that Mrs. Gray was entitled to nothing except a few small advances he had previously given indicated his intent. There were many offerings showing the requisite intent and to say that there was no evidence whatsoever is, the State contends, quite ridiculous.

CONCLUSION

The Writ sought herein having first been raised subsequent to the Louisiana Supreme Court affirming the conviction does not entitle the defendant to present himself before this Honorable Court to have his arguments heard. Petitioner seeks relief from alleged errors in the ruling of the trial court on such issues as continuance and sufficiency of answer to bill of particular,

which rulings were correctly made in accordance with statutes and jurisprudence and which do not present a federal constitutional question which would entitle petitioner to the relief sought. Finally, the constitutional provision for trial by jury for relative felonies in the State of Louisiana do not violate the due process clause for the United States Constitution. Wherefore, the State of Louisiana, through the undersigned, respectfully urges This Honorable Court to affirm the conviction obtained herein.

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF
LOUISIANA

J. NATHAN STANSBURY,
DISTRICT ATTORNEY FOR
THE FIFTEENTH
JUDICIAL DISTRICT

WILLIAM J. BURRIS
ASSISTANT DISTRICT
ATTORNEY

CERTIFICATE

I, J. Nathan Stansbury, a member of the Bar of the Supreme Court of the United States, certify that the requisite number of copies of the foregoing Brief on Behalf of the State of Louisiana, Respondent, have been served on Risley C. Triche, Attorney for Petitioner, at his office in Napoleonville, Louisiana, 70390, this ____ day of January, 1979.

J. NATHAN STANSBURY